Supreme Court, U.S.
FILED
JAN 27 1998
CLERK

No. 97-870

In the Supreme Court of the United States

OCTOBER TERM, 1997

L.B. FOSTER COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

VINCENT J. BLACKWOOD
Acting Deputy General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ROBERT J. GREGORY
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

14 pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner was not entitled to an award of attorney's fees because the Equal Employment Opportunity Commission's employment-discrimination action against petitioner was not frivolous, unreasonable, or without foundation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Carrion v. *Yeshiva Univ.*, 535 F.2d 722 (2d Cir. 1976)	10
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978)	4, 5, 8, 10
Quiroga v. *Hasbro, Inc.*, 934 F.2d 497 (3d Cir.), cert. denied, 502 U.S. 940 (1991)	6, 10
Sullivan v. *School Bd.*, 773 F.2d 1182 (11th Cir. 1985)	9

Statute and rule:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2
Fed. R. Civ. P. 52	4

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-870

L.B. FOSTER COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 123 F.3d 746. The pertinent opinions and orders of the district court (Pet. App. 18a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1997. The petition for a writ of certiorari was filed on November 20, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent, the Equal Employment Opportunity Commission (Commission), filed suit against petitioner in 1990. Pet. App. 5a. The Commission alleged, in part, that petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), by failing to promote the charging party, Jo Ann Wilson, because of her sex. Pet. App. 5a. The Commission also alleged that petitioner violated Title VII by retaliating against Wilson after she threatened to file a sex-discrimination suit. *Ibid.* Wilson later intervened in the suit, alleging similar claims. *Ibid.*

The Commission's promotion claim centered on petitioner's decision to promote a male candidate, Steven Hahn, to the position of corporate credit manager. Pet. App. 3a-5a. The Commission presented evidence that Wilson was the more qualified candidate for the position. *Id.* at 5a, 10a. The Commission also produced evidence that petitioner's stated reasons for choosing Hahn over Wilson were pretextual, citing to substantial discrepancies in petitioner's proffered reasons for rejecting Wilson. *Id.* at 10a; Gov't C.A. Br. 8-10 (citing record evidence). Finally, the Commission presented evidence of gender bias on the part of petitioner, including evidence that women were largely excluded from the upper ranks of petitioner's corporate hierarchy. Gov't C.A. Br. 10-11 (citing record evidence).

The Commission's retaliation claim focused on the conduct of David Minor, the chief decisionmaker. There was evidence that, after Wilson resigned from her position, Minor refused to provide a job reference for her, even though he had routinely provided job

references for other former employees. Pet. App. 4a-5a, 11a-12a. Minor testified, in his deposition, that he had not provided a reference for Wilson because the human resources director, Linda Terpenning, had instructed him to refer all calls about Wilson to her. *Id.* at 11a. Minor's story was contradicted by Terpenning herself, who testified in her deposition that she had given no such instruction to Minor. *Id.* at 12a. There was evidence that Wilson had threatened to file a sex-discrimination suit and that Minor was aware of this at the time he refused to provide her with a job reference. *Ibid.*

In its original complaint, the Commission sought back pay, with respect to the promotion claim, in the amount of the difference between the salary Wilson would have been paid had she been promoted and the salary she would have been paid in her previous position had she not resigned. Pet. App. 15a n.6. Wilson, who intervened in the case, sought back pay to reflect the full amount that she would have been paid if she had been promoted and had not resigned. *Ibid.* The Commission subsequently joined in that request. *Ibid.*

2. Following discovery, petitioner moved for summary judgment. The motion was referred to a magistrate judge, who recommended that the motion be denied with respect to the promotion and retaliation claims asserted by the Commission and Wilson. C.A. App. 526-533. The magistrate specifically ruled that the plaintiffs had established a prima facie case of discrimination on both claims, and that there were questions of fact that precluded summary judgment. *Ibid.* Petitioner did not file objections to the magistrate's report, and the district court, after a de

novo review of the record, adopted the magistrate's recommendation. *Id.* at 537.

The case was tried to the district court, without a jury, in November 1992 and July 1993. Gov't C.A. Br. 4-5. At the close of the plaintiffs' case, petitioner moved for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 52. C.A. App. 469-470. The court declined to rule on petitioner's Rule 52 motion and permitted the case to go forward. *Id.* at 169. At the close of trial, the court directed the parties to submit proposed findings of fact and conclusions of law. *Id.* at 414. The court subsequently issued a lengthy opinion with detailed findings of fact and conclusions of law. Pet. App. 26a-60a. The court ruled in petitioner's favor on both the promotion claim and the retaliation claim, finding that the Commission and Wilson had not carried their burden of proving unlawful discrimination. *Ibid.* Neither the Commission nor Wilson appealed from the court's decision.

Following judgment, petitioner sought an award of attorney's fees from the Commission, but not from Wilson. Pet. App. 5a. The district court awarded fees in the amount of $142,628.50, ruling that the Commission's action, "including the [promotion,] retaliation and back pay claims," was "meritless, frivolous, unreasonable and without foundation" within the meaning of this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). Pet. App. 5a, 23a-24a.

3. The court of appeals reversed the district court's award of attorney's fees. The court of appeals first noted that attorney's fees may be awarded to a prevailing defendant in a Title VII case only upon a showing that the plaintiff's action "was frivolous,

unreasonable, or without foundation." Pet. App. 7a (quoting *Christiansburg*, 434 U.S. at 421). The court stressed that "'frivolous, unreasonable, or without foundation,' in this context, implies 'groundless . . . rather than simply that the plaintiff has ultimately lost his case.'" *Ibid.* The court determined that the Commission's promotion claim was not frivolous or without foundation because the Commission presented evidence that could have persuaded a "reasonable fact finder" that petitioner "discriminated against Wilson on the basis of sex." *Id.* at 10a. Similarly, the court concluded that the district court "abused its discretion in awarding [petitioner] its fees on [the retaliation] claim," because there "was some factual basis for the [claim]." *Id.* at 15a. Finally, the court ruled that the Commission's legal theory in support of its claim for full back-pay was not frivolous. The court stressed that the Third Circuit had not yet ruled on that precise legal issue and that there was precedent elsewhere to support the Commission's theory. *Id.* at 15a-17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner argues (Pet. 11-16) that the court of appeals erroneously reversed the district court's award of attorney's fees. In fact, the court of appeals correctly applied the standard announced by this Court in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), to the particular circumstances of the present case. That fact-bound determination does not merit further review.

The Commission in this case established a prima facie case of sex discrimination and adduced a substantial body of pretext evidence. It also cited to substantial discrepancies in petitioner's explanation for declining to provide a job reference for Wilson. The court of appeals noted correctly that, under the *Christiansburg* standard, attorney's fees are not awarded as a matter of course to a prevailing Title VII defendant. Pet. App. 7a. The court ruled that the Commission had presented viable claims of discrimination that could have persuaded a reasonable fact finder. The court concluded that, because there was record evidence that reasonably supported the Commission's claims, a fee award was inappropriate under the *Christiansburg* standard.

Petitioner asserts (Pet. 12) that the court of appeals did not accord appropriate deference to the "discretion of the district court." That is incorrect. The court of appeals acknowledged that the decision to award fees under the *Christiansburg* standard is entrusted, as an initial matter, to the sound discretion of the district court. Pet. App. 5a-7a. It further acknowledged that it was obliged to "defer to the district court's fee determination unless [the district court] has erred legally, or the facts on which the determination rests are clearly erroneous." *Id.* at 6a (quoting *Quiroga* v. *Hasbro, Inc.*, 934 F.2d 497, 502 (3d Cir.), cert. denied, 502 U.S. 940 (1991)).

Nor is it true, as petitioner contends (Pet. 10, 13), that the court of appeals "re-weighed the evidence" or "disregarded the credibility determinations of the district court." In appealing the fee award, the Commission did not challenge the district court's underlying factual findings. The Commission, in fact, acknowledged that "there is evidence in the record

to support [petitioner's] view that it had legitimate reasons for refusing to promote Jo Ann Wilson and for denying her a reference." Gov't C.A. Reply Br. 2. The Commission's argument was not that the evidence compelled a finding in its favor but rather that the evidence would have reasonably supported such a finding, thus precluding the award of fees under the *Christiansburg* standard.

The court of appeals adopted this argument. The court never questioned the validity of the district court's credibility or factual findings. The court offered "no opinion" on whether the Commission's evidence should have "carr[ied] the day" on the merits. Pet. App. 15a. Rather, it simply determined that the Commission presented evidence which, "if credited, would have been sufficient to support a verdict in favor of the [Commission]." *Id.* at 10a. The court reversed the district court's award of fees because it determined that a "reasonable fact finder" *could have* believed the Commission's proof and found against petitioner, *ibid.*, not because it disagreed with the district court's credibility determinations. Pet. 13. As the court of appeals' analysis illustrates, the central factual inquiry in applying *Christiansburg* is merely to ascertain what evidence was in the record. That is not a matter that would ordinarily present any reason to make a credibility determination, or even to resolve a factual dispute.

In *Christiansburg*, this Court did not grant district courts unbridled discretion "to determine whether an action is frivolous, meritless or without foundation." Pet. 12. To the contrary, the Court emphasized the need to ensure that district courts "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not

ultimately prevail, his action must have been unreasonable or without foundation." 434 U.S. at 421-422 (stressing that such reasoning would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII"). In the present case, the court of appeals invoked that principle to support its holding that the district court had erred. Pet. App. 11a. The court did not adopt any "iron clad" or "mechanical" rules concerning the award of fees. Pet. 11-12. Rather, it simply held that the district court abused its discretion by awarding fees to petitioner in the circumstances of the present case. The court of appeals correctly applied the *Christiansburg* standard and properly ruled in the Commission's favor on the fees issue.

2. Petitioner advances a number of broad legal arguments in support of its request for further review by this Court. Petitioner's assertions, even if correct, have no relevance to the decision of the court of appeals in this case.

Petitioner first contends (Pet. 12) that a "case can be frivolous when it turns on credibility." While it may be true that "[a]n incredible plaintiff can have a frivolous case," *id.* at 14, the court of appeals did not rule to the contrary. Rather, it concluded that fees were improperly awarded in the present case because a "reasonable fact finder" could have credited the Commission's evidence. Pet. App. 10a. The court of appeals did not reject, as a per se matter, "fee awards which are based on credibility determinations." Pet. 14.

Petitioner also asserts that a "case can be unreasonable even when a plaintiff states a prima facie case and the case reaches trial." Pet. 16. That assertion may be true. It is consistent, however, with

the decision of the court of appeals. The court of appeals noted that, "[i]n determining if an award of counsel fees to a Title VII defendant is appropriate, courts should consider several factors including * * * 'whether the plaintiff established a prima facie case.'" Pet. App. 8a (quoting *Sullivan* v. *School Bd.*, 773 F.2d 1182, 1189 (11th Cir. 1985)). The court cited, as an additional factor, "whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Ibid.* Although it referred to these factors, the court stressed that they are merely "guideposts, *not hard and fast rules*." Pet. App. 8a (emphasis added) (noting that the inquiry into an award of attorney's fees is "individualized"). The court of appeals thus eschewed the very kind of "mechanical" rule that petitioner argues against.

The same is true of petitioner's contention that employers "have a right to settle even frivolous claims to avoid litigation costs." Pet. 17. The court of appeals did mention, as one factor bearing on the award of fees, "whether the defendant offered to settle." Pet. App. 8a (quoting *Sullivan*, 773 F.2d at 1189). Again, however, the court did not establish a "hard and fast" rule that an offer to settle precludes a fee award. Pet. App. 8a. Moreover, the court did not even mention this factor in reversing the fee award in the present case. *Id.* at 9a-17a.

Next, petitioner contends (Pet. 18) that a legal argument "can be meritless even when there is no direct circuit precedent" on point, referring to the court of appeals' ruling that the Commission's position on the back-pay issue was not frivolous. Petitioner has again misread the court's decision. The court did not adopt any per se rule concerning the standard for determining whether a party's legal

position is frivolous. The court simply ruled that, in the present case, the Commission's legal position was not frivolous because the issue had not been resolved in the Third Circuit and because there was precedent elsewhere to support it. Pet. App. 15a-17a.

Finally, petitioner complains (Pet. 20) that the "circuit courts improperly are predisposed to not award fees to prevailing defendants." This Court, however, made clear in *Christiansburg* that fees should not be "routinely" awarded to prevailing Title VII defendants. See 434 U.S. at 421 (quoting *Carrion* v. *Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir. 1976)). In appropriate cases, courts of appeals have been willing to sustain fee awards under the *Christiansburg* standard. See, *e.g.*, *Quiroga*, 934 F.2d at 502-503. Conversely, the courts of appeals have not hesitated to reverse fee awards where, as here, a district court misapplies the teachings of *Christiansburg*. See Pet. App. 7a-8a (citing cases).

3. Petitioner makes two additional arguments that stray from the factual record in this case. First, petitioner asserts (Pet. 3) that "settlement could not be meaningfully pursued" in this case, "in large part" because of the Commission's effort "to seek backpay damages past the date of [Wilson's] resignation from [petitioner]." That assertion has no support in the record. Instead, the record shows that it was Wilson's attempt to add a claim for compensatory and punitive damages that forestalled settlement. C.A. App. 445-446. The record also shows that the amount of back pay sought by the Commission was no more than the amount that had already been requested by Wilson. Pet. App. 15a n.6.

In a similar vein, petitioner suggests (Pet. 15, 16) that the district court actually awarded fees in this

case because the court knew "that the case proceeded to trial to blacken David Minor's reputation," and believed the Commission's "entire case to be nothing more than a crude attempt to extort payment from an innocent defendant." Notably, petitioner provides no record support for those assertions. Indeed, no such supposed justification for the fee award is mentioned in the district court's fee decision. See Pet. App. 20a-25a.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

C. GREGORY STEWART
General Counsel

VINCENT J. BLACKWOOD
Acting Deputy General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ROBERT J. GREGORY
Attorney
Equal Employment Opportunity Commission

JANUARY 1998

---

* In addition, petitioner's arguments overlook the critical fact that, once Wilson intervened, her counsel assumed a major role in prosecuting the case. It was Wilson, not the Commission, who forestalled settlement by pursuing a claim for compensatory and punitive damages. It was Wilson's counsel, not the Commission's, who pursued the line of questioning, about which petitioner complains (Pet. 15), concerning alleged misconduct by Minor. Having elected to seek fees only against the Commission, petitioner cannot now complain of actions taken by Wilson that, so far as the record discloses, had nothing to do with the district court's fee decision.